A

## UTAMA MERCHANT BANK BHD

**v.**

## GKM WILAYAH-PRESCON SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-101-2001]
18 SEPTEMBER 2008

C ***CONTRACT:*** *Guarantee - Bridging loan - Liability - Whether guarantors discharged from liability due to restructuring of loan - Whether liability of guarantors co-extensive - Whether plaintiff waived conditions precedent to release of bridging loan - Reliance on certificate of indebtedness to prove claim against defendant*

D ***CONTRACT:*** *Agreement - Bridging loan - Recovery of - Guarantors - Whether guarantors discharged from liability due to restructuring of loan - Whether liability of guarantors co-extensive - Whether plaintiff waived conditions precedent to release of bridging loan - Reliance on certificate of indebtedness to prove claim against defendant*

E

The plaintiff's claim against the first defendant was for the recovery of a bridging loan granted by the plaintiff to the first defendant company for the purpose of a property development project. The third to eighth defendants were joint and several guarantors of the
F loan while the second defendant was a corporate guarantor. The issues that arose were (1) whether the defendants were discharged from their liability under the letters of guarantee and the corporate guarantee and indemnity in view of the fact that the loan was restructured; (2) whether the plaintiff had waived the
G conditions precedent to the release of the bridging loan to the first defendant and (3) whether the defendants were bound by the judgment obtained by the plaintiff against the first defendant principal debtor.

H **Held (allowing plaintiff's claim against the second to sixth defendants; judgment likewise entered against the seventh and eighth defendants as joint and several guarantors together with the third to sixth defendants with costs):**

I **(1)** The liability of the guarantors was co-extensive with the judgment debt obtained against the first defendant in this case as certified by the Certificate of Indebtedness showing the

sum of RM3,988,816.90 due and owing. The argument for the defendants that the condition precedents to the release of the bridging loan to the first defendant had been waived and constituted a substantial variation of the terms of the bridging loan agreement which operated to discharge the guarantors from liability was untenable. The condition precedents referred to were at most voidable at the option of the plaintiff and in this case it had elected to waive them. Further, the plaintiff was entitled in any case under the bridging loan agreement itself under cl. 5.2 to waive any condition precedent. (paras 8 & 9)

**(2)** The plaintiff need not rely on the judgment order it obtained against the first defendant as it was relying on the certificate of indebtedness to prove the claim against the defendants. The issue of admissibility of the judgment order was therefore academic although it was clear that the judgment was relevant to show the co-extensiveness of the liability of the first defendant with the guarantors and indemnifiers – the other defendants. (para 11)

**Case(s) referred to:**
*Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168* ***(refd)***
*Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors [1990] 1 CLJ 687; [1990] 1 CLJ (Rep) 141* ***(refd)***
*Ooi Boon Leong & Ors v. Citibank NA [1984] 1 LNS 26* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, ss. 86, 92
Evidence Act 1950, s. 43
Rules of the High Court 1980, O. 14A

*For the plaintiff - SM Lim (Clement Wong with her); M/s Raja, Darryl & Loh*
*For the 2nd, 3rd, 4th, 5th & 6th defendant - Harpal Singh Grewal (Jasvinjit Singh & Harwinder Kaur with him); M/s AJ Ariffin, Yeo & Harpal*

*Reported by Suhainah Wahiduddin*

A

## JUDGMENT

**Kang Hwee Gee J:**

**This Is My Oral Judgment: (Ex-tempore)**

B **[1]** The plaintiff's claim against the 1st defendant is the recovery of bridging loan granted by the plaintiff to the 1st defendant company for the purpose of a property development project.

**[2]** The 3rd to the 8th defendants are joint and several C guarantors of the loan *vide* a letter of guarantee dated 11 January 1995. The 2nd defendant is a corporate guarantor *vide* a corporate guarantee and indemnity dated 11 January 1995.

**[3]** On my own motion I had proposed to which the parties D had agreed that this case be proceeded by way of O. 14A on the following issues:

i. Whether the defendants are bound by the judgment obtained by the plaintiff against the 1st defendant principal debtor.

E ii. Whether the defendants are discharged from their liability under the letters of guarantee and the corporate guarantee and indemnity in view of the fact that the loan was restructured on about 15 October 1999.

F **[4]** The following facts are agreed:

i. Plaintiff's statement of agreed facts in respect of the 2nd to 6th defendants (to include the specific agreements signed) as follows:

G 1. The 2nd Defendant is a company incorporated in Malaysia with its registered address at D12, Tingkat 1, Plaza Pekeliling, 2 Jalan Tun Razak, 50400 Kuala Lumpur.

2. The 3rd and 4th Defendants are both individuals with their address at 'Wandara', No. 1 Jalan 12/1, Taman Tun Abdul H Razak, 68000 Ampang, Selangor Darul Ehsan.

3. The 5th Defendant is an individual with his address at No. 10C, Kompleks Damai, Jalan Lumut, Off Jalan Tun Razak, 50400 Kuala Lumpur.

I 4. The 6th Defendant is an individual with his address at No. 10, Kompleks Damai, Jalan Lumut, Off Jalan Tun Razak, 50400 Kuala Lumpur.

5. The 1st Defendant has executed a Bridging Loan Agreement and a Debenture both on or about 11.1.95 whereby the Plaintiff granted and the 1st Defendant accepted a bridging loan facility of RM14,000,000.00 ("said Facility").

6. The 1st Defendant has utilised the said Facility.

7. By way of a Corporate Guarantee and Indemnity dated 11.1.95, the 2nd Defendant in consideration of the Plaintiff granting to the 1st Defendant the said Facility, at the 1st Defendant's request, have agreed to indemnify and pay to the Plaintiff on demand all of the 1st Defendant's indebtedness.

8. By way of a Letter of Guarantee dated 11.1.95, the 3rd to 8th Defendants in consideration of the Plaintiff granting to the 1st Defendant the said Facility, at the 1st Defendant's request, have agreed to jointly and severally pay to the Plaintiff on demand all moneys owing to the Plaintiff by the 1st Defendant.

ii. On 27 December 1997 the plaintiff wrote to the 1st defendant intimating that the plaintiff was prepared to restructure the loan and to request to the 1st defendant to make such a letter to reconsider allowing the 1st defendant to restructure. The letter read as follows:

GKM Wilayah Prescon Sdn Bhd
27A, Jln 1/48A, Sentul Perdana
Bandar Baru Sentul
51000 Kuala Lumpur. 27th Dec 1997

Attn: Dato' Elli Hj Mohd Tahir
Executive Director

Dear Dato',

**RM14.0 Million Bridging Loan Facility**

During my recent visit to your office and subsequent telephone discussions you mention that due to the progress of the development, the project's cashflow may not be able to fully repay the bridging loan by January 1998 as originally agreed.

I've mentioned that the Bank is prepared to consider your request to restructure the loan instalment to suit your revised cashflow projections based on the progress of the building construction and receipt of progress payments.

A Todate two (2) principal instalments of RM2,083,333 remains unpaid. Under the new Bank Negara Malaysia (BNM) guidelines the Bank is required to report to BNM a loan as non-performing as soon as interest and/or principal is outstanding for 3 months.

B In view of the foregoing could you arrange to pay at least one principal instalment while we process your request to restructure the loan. In this regard we are still waiting for your submission of the application to restructure the loan.

C Yours faithfully,
for Utama Merchant Bank Bhd

Sgd.

Ben Ooi
Corporate Banking
D

iii. On 30 December 1997 the 1st defendant responded by making an application to restructure as proposed by the plaintiff as follows:

E Our Ref. : SP/UMBB/97/250
Date: 30th December 1997.

Utama Merchant Bank Berhad
27th. Floor, Central Plaza,
Jalan Sultan Ismail,
F 50250 Kuala Lumpur.
(Attn: Mr. Ben Ooi)

Dear Sirs,

G **Re: Application To Restructure Balance Of Loan Repayment.**

Kindly refer to the above.

We wish to extend our gratitude towards your willingness to consider on the matter concerning the time of repayment
H of the Bridging Loan Facility. We would like to inform you that the outstanding principal loan repayment to you is RM6.25 million which originally should be paid in full by 19th. January 1998.

I In the light of the current economic recession, we have made several reformations on our financial cash flow, specifically on the flow of the building of 4/5/6 and 7 storey Anjung Villa (Low Rise) Condominiums.

From our estimation, we are confident to meet the said settlement within a.reasonable time so as to enable us to collect progressive payment from the purchaser. Attached herewith is a copy of the cash flow of the 4/5/6 and 7 storey Anjung Villa Condominium for your analysis in considering our application for the restructure of principal loan repayment.

Your kind consideration in this matter is warmly regarded.

Thank you.

Yours faithfully,
GKM Wilayah Prescon Sdn. Bhd.

Sgd.
...
(Dato' Elli B. Hj. Mohd Tahir)
Executive Director.

iv. By another letter dated 16 January 1998 the 1st defendant made a further proposal with a substantial payment of RM1.1 million to the plaintiff which was accepted by the plaintiff. The letter read as follows:

Date: 16th.January, 1998
Ref: SP/UMBB/98/006

The Manager,
Utama Wardley Merchant Bankers
Tingkat 27, Plaza Central,
Jalan Sultan Ismail,
Kuala Lumpur.

(Attn: Mr.Ben Ooi)

Dear Sir,

**Re: Repayment Of The 4th Instalment Of The Bridging Loan**

Kindly refer to the above.

We are pleased to inform you of our intention to repay the outstanding remaining loan.

However, we would be pleased if you would allow us to make the above repayment in a staggered manner.

A We hereby extend our proposal for the payments as follows:

Trench 1 : RM1.1 Million (before 19/1/98)
Trench 2 : RM0.9 Million (before end February, 98)

B Expressing our intention of paying the abovementioned instalment, please find herewith a cheque made out to Utama Merchant Bank Berhad (ref: MBB368030) amounting RM1,100,000.00 (Ringgit One Million One Hundred Thousand Only) for your further action.

C We sincerely hope you will consider our proposal favourably.

Your support and cooperation in this matter is warmly regarded.

D Thank you.
GKM Wilayah Prescon Sdn Bhd

Sgd.

E Dato' Elli Bin Haji Mohd Tahir DIMP, B(Sc) Geol.
Executive Director.

v. The plaintiff restructured the bridging loan by its letter dated 24 January 1998:

F GKM Wilayah-Prescon Sdn Bhd
27 A, Jalan 1/48A, Sentul Perdana
Bandar Baru Sentul
51000 Kuala Lumpur. 24th Jan 1998

Attn: Dato' Elli bin Mohd Tahir

G Dear Sirs,

**Bridging Loan Of RM14.0 Million**

H We refer to the captioned facility extended to you. Under the terms of the Bridging Loan Agreement dated 11th January 1995 ('Loan Agreement') and following your request to restructure the loan, we are pleased to advise that the Bank has approved your request.

I The repayment of the outstanding loan of RM5,150,000 is now revised as follows:

| Repayment Dates - 1998 | Minimum amount to be paid |
|---|---|
| 28th February | RM1,000,000 |
| 31st March | 650,000 |
| 30th April | 750,000 |
| 31st May | 850,000 |
| 30th June | 950,000 |
| 31st July | 950,000 |
| Total | 5,150,000 |

The above variation is within Clause 8.2 of the Loan Agreement. In consideration of the variation, a one-time fee of RM20,000 is payable upon acceptance of this letter.

Save and except for the foregoing all other terms and conditions as set out in the Loan Agreement shall remain unchanged.

If the foregoing is acceptable to you, kindly arrange to return the duplicate copy of this letter duly accepted together with your Board Resolution sanctioning same within 14 days from the date of this letter; after which the Bank shall have the right to rescind the Offer or amend the terms and conditions.

Yours faithfully,
for Utama Merchant Bank Bhd

Sgd.

Imran Busari
Asst General Manager
Corporate Banking

vi. On 2 March 1998 the 1st defendant submitted their audited account for the year 1996 and the management account for the month of September 1997 *vide* by a letter of the same date.

vii. On 6 March 1998 the 1st defendant made two more payments respectively for the sum of RM56,369.87 and RM68,301.94 as penalty interest to the plaintiff.

viii. A day earlier the 1st defendant had made a payment of RM1 million to the plaintiff. This was mentioned in the letter dated 6 March 1998.

ix. The plaintiff again restructured its repayment by the letter dated 6 July 1998:

GKM Wilayah-Prescon Sdn Bhd
27A, Jln 1/48A, Sentul Perdana
Bandar Baru Sentul
51000 Kuala Lumpur. 6th July 1998

Attn: Dato' Elli Hj Mohd Tahir
Executive Director

Dear Sirs,

**Restructuring of Outstanding Bridging Loan**

This is to advise that the Bank has extended the expiry date of the captioned loan from 30th June 1998 to 30th September 1998 on the following conditions:

a. Interest to be serviced on a monthly basis;

b. Principal repayment to start from lst October 1998; the amount to be discussed and this will depend on the cashflows from the project;

c. A monthly report on the project covering sales, progress claims made on the buyers/end financiers and physical construction.

We understand that DBKL has approved your proposal to revise the remaining two blocks of high rise condominium to a medium cost development selling below RM150,000 per unit.

Please advise the implementation of the revised development and submit a revised cashflow. This should determine the repayment schedule.

Kindly acknowledge the receipt of this letter by signing and returning the duplicate copy to us.

Yours faithfully,
for Utama Merchant Bank Bhd

Sgd. Sgd.

Imran Busari Ben Ooi
Asst. General Manager Manager
Corporate Banking

x. The plaintiff again restructured its repayment by the letter dated 5 October 1998.

GKM Wilayah-Prescon Sdn Bhd
27A, Jalan 1/48A,
Sentul Perdana
Bandar Baru Sentul
51000 Kuala Lumpur. 5th Oct 1998

**Attn: Dato' Elli bin Mohd Tahir and William Hui**

Dear Sirs,

**Bridging Loan Of RM14.0 Million Sentul Perdana Project**

We refer to the captioned facility extended to you to part finance the development of Sentul Perdana undertaken jointly with Datuk Bandar Kuala Lumpur.

Following your recent request to restructure the loan and pursuant to clause 8.2 of the Bridging Loan Agreement dated 11th January 1995, we are pleased to advise that the Bank has approved your request on the following terms:

(a) The repayment of the outstanding loan of RM4,150,000 is now revised as follows:

| Period | Monthly principal | Amount to be paid |
|---|---|---|
| Oct 98 to March 99 (6 mths) | Nil* | Nil* |
| April 99 to Feb. 2001 (23 mths) | RM170,000 | RM3,910,000 |
| March 200l (1 mth) | RM240,000 | RM 240,000 |
| *only interest to be serviced | Total | RM 4,150,000 |

The expiry date is now extended from 30th September 1998 to 30th March 2001; an extension of 30 months;

(b) The Bank shall be appointed as one of the authorised signatories to approve all payments out of the Escrow/ Project Account or appoint a Monitoring Accountant during the currency of the loan.

Save and except for the foregoing all other terms and conditions as set out in the Loan Agreement shall remain unchanged.

If the foregoing terms are acceptable to you, kindly arrange to return the duplicate copy of this letter duly accepted together with your Board Resolution sanctioning same

A within 14 days from the date of this letter; after which the Bank shall have the right to rescind the Offer or amend the terms and conditions.

Yours faithfully,
for Utama Merchant Bank Bhd

B

| | |
|---|---|
| Sgd. | Sgd. |
| Imran Busari | Ben Ooi |
| Asst General Manager | Manager |
| Head, Corporate Banking | |

C We, GKM Wilayah-Prescon Sdn Bhd confirm our acceptance of the above terms and undertake to comply and observe the same.

Sgd.
D ...
authorised signatories
Name: Dato' Elli B. Haji Mohd Tahir
Date:

E xi. Thereafter there were numerous payments being made by the 1st defendant to the plaintiff pursuant to the restructured repayment as agreed to between the 1st defendant and the plaintiff.

F xii. On 8 April 1999 the plaintiff confirmed by letter the terms of the restructuring of the repayment of the loan as agreed to between the plaintiff and the 1st defendant. The letter to the 1st defendant read as follows:

G GKM Wilayah Prescon Sdn Bhd By Fax & Hand
27A. Jalan 1/48 A, Sentul Perdana
Bandar Baru Sentul
51000 Kuala Lumpur. 8th April 1999

**Attn: Dato' Elli Hj Mohd Tahir, Executive Director.**

H Dear Dato' Elli,

**Bridging Loan Facility - RM4,150,000**

I We refer to our meeting on 24th March 99 to discuss the status of your project and the repayment of the captioned loan. The key points discussed were:

1. As at 31st March the outstanding sum is as follows:

   principal - RM4,150,000 (due end April 99)
   interest - RM47,881.35

2. The proposed revised development to medium cost apartments has received inprinciple approval from DBKL. Upon receipt of its official approval you will proceed to obtain such other approvals as is necessary from other government bodies including the Ministry of Housing.

3. Upon receipt of the foregoing approvals you will proceed to launch the project. We understand todate you have received numerous enquiries from interested buyers who have given their names to your sales office.

   Upon signing of the Sales & Purchase agreements you can collect 10% initial deposit and shortly thereafter bill the buyers for another 10/15% for piling works which have been completed since last year.

4. The original bridging loan required was RM20.0 million for the construction of the revised development. But due to the additional 'scaling down' the current budget is RM12.0 million.

5. You will meet Maybank on 26th March to finalise your financing requirements. With respect to the security arrangement the Bank is prepared to discharge the debenture over the company's assets subject to the new financier redeeming our loan outstanding.

6. Following your request to reschedule the bridging loan in September last year, the Bank has agreed to same. The principal instalment will start from end April 1999 as follows:

   | | |
   |---|---|
   | April 99 to Feb. 2000 (23 mths): | RM170,000 a month plus interest |
   | March 2001 | : RM240,000 plus interest. |

7. Considering the future launch date of the revised development and your application for a fresh bridging loan you have requested to defer the principal instalment from end April 1999 to end July 1999.

8. The current balance in the Project Account is in excess of RM500,000. This should enable you to meet interest and principal instalments for at least 2 months during which time the Bank may consider your request (No. 7).

Upon receipt of this letter please submit to us your request for withdrawal from the Project A/C to meet interest due (RM47,881.35 up to end March 99) and principal instalment of RM170,000 due end April 1999.

Thank You and Regards,

Yours faithfully,
for Utama Merchant Bank Bhd

Sgd.
Ben Ooi
Manager, Corporate Banking

xiii. The plaintiff again restructured its repayment by the letter dated 15 October 1999:

15 October 1999

GKM Wilayah-Prescon Sdn Bhd
27A, Jalan 1/48A,
Sentul Perdana
Bandar Baru Sentul
51000 Kuala Lumpur.

Attn: Dato' Elli Mohd Tahir

Dear Dato',

**Re: Bridging Loan Agreement Dated 11 January 1995**
**Principal Outstanding: RM4,150,000.01**

We refer to the above facility and your request as per the letter dated 29 September 1999 and hereby inform that Utama Merchant Bank Bhd has agreed to restructure the schedule of repayment of the outstanding principal amount as follows:

| Payment Date | Amount for Repayment |
|---|---|
| 31 October 1999 | RM 50,000.00 |
| 30 November 1999 | RM 100,000.00 |
| 31 December 1999 | RM 100,000.00 |
| 31 January 2000 | RM 50,000.00 |
| 28 February 2000 | RM 50,000.00 |
| 31 March 2000 | RM 150,000.00 |
| 20 April 2000 | RM 200,000.00 |
| 31 May 2000 | RM 200,000.00 |
| 30 June 2000 | RM 300,000.00 |

| | |
|---|---|
| 31 July 2000 | RM 50,000.00 |
| 31 August 2000 | RM 50,000.00 |
| 30 September 2000 | RM 150,000.00 |
| 31 October 2000 | RM 200,000.00 |
| 30 November 2000 | RM 100,000.00 |
| 31 December 2000 | RM 100,000.00 |
| 31 January 2001 | RM 50,000.00 |
| 28 January 2001 | RM 50,000.00 |
| 31 March 2001 | RM 300,000.00 |
| 30 April 2001 | RM 300,000.00 |
| 31 May 2001 | RM 300,000.00 |
| 30 June 2001 | RM 500,000.00 |
| 31 July 2001 | RM 300,000.00 |
| 31 August 2001 | RM 500,000.01 |
| Total | RM4,150,000.01 |

All other terms and conditions pertaining to the above facility shall remain as per the Bridging Loan Agreement dated 11 January 1995.

Please be informed that no further restructuring on the above facility shall be allowed. Kindly adhere strictly to the above repayment schedule and keep interest payments current at all times.

Acceptance of the abovementioned variation shall be confirmed upon the Bank's receipt of:

1. extract of Board Resolution of GKM Wilayah-Prescon Sdn Bhd resolving due acceptance of the abovementioned repayment schedule, and

2. duly signed acceptance of the abovementioned repayment schedule in the duplicate of this letter hereof.

Thank You.

Yours Faithfully,
for Utama Merchant Bank Berhad

Sgd.
Stephanie Chiam
Senior Manager
Credit Risk & Loan Recovery Unit

Sgd.
Lim Ah Bah
Chief Executive Officer

A We hereby accept the revised schedule for principal repayments and undertake to settle all outstanding principal amounts according to the revised schedule as well as to keep interest current as long as any amount remains outstanding under this facility.

B Sgd.

For and on behalf of GKM Wilayah-Prescon Sdn Bhd
Authorised Signatories and Company Stamp
Date: 15th October, 1999

C c.c. Dewan Bandaraya Kuala Lumpur
Bahagian Penswastaan & Usahasama
Jabatan Perancang Ekonomi & Kemudahan Sosial
Tingkat 26, Bangunan Dewan Bandaraya
Jalan Raja Laut
50350 Kuala Lumpur
D Untuk Perhatian: Puan Normah bte Malik

c.c. Guarantors: Artic Building & Civil Engineering Sdn Bhd
Mohd Tahir @ Tahir bin Hj Abdul Salam
Elli bin Mohd Tahir @ Tahir
E Dato' Ahmad Razali bin Mohamed Ali
Wan Mah bt. Rejab
Lee Foo Chong
Ong Puay Koon

## [5] Submission by Miss Lim for the plaintiff

F i. The plaintiff has obtained judgment against the 1st defendant on 23 August 2007 for the sum of RM3,988,816 as at 31 August 2000 and interest thereon at the rate of 2.5% above the plaintiff's cost of fund calculated from 1 September 2000 until the date of full and final settlement. The 2nd
G defendant had provided a corporate guarantee and indemnity dated 11 January 1995 to the plaintiff and the 3rd to 8th defendants (individuals) provided the plaintiff with a letter of guarantee dated 11 January 1995. Both were in consideration
H of the bridging loan facility of RM14 million which the plaintiff provided to the 1st defendant.

ii. The guarantors' liability is co-extensive with the debt owed by the principal debtor, the 1st defendant in this case.

I iii. The fact that the loan was restructured on numerous occasions would not discharge the guarantors' liability as

clauses in the two guarantees provide for such eventuality. See cls. 4.2 and 4.6 of the corporate guarantee and Indemnity and cl. 6(iii) of the letter of guarantee:

> 4.2 to grant to the Borrower, the Corporate Guarantor and/or any guarantor and/or surety and/or any other person any time, forbearance, relaxation or indulgence; and/or
>
> 4.6 to make or effect or accept any compromise, composition, arrangement or dealing with the Borrower and/or any guarantor or surety or any other person; and/or
>
> 6(iii) any time given or extended to the Borrower and/or any other person or persons including myself and/or any of ourselves and the parties to any negotiable or other security instrument guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the Borrower and/or any other person or persons whether with or without consent or notice to me/us;

iv. The letters to restructure the loan merely extended the period of repayment while all other terms pertaining to the loan remained. There is no dispute that the loan is in default despite the restructuring in that the 1st defendant failed to comply with the restructuring terms. Therefore a letter of demand was sent to the guarantors dated 5 December 2000.

v. The 2nd to the 6th defendants have knowledge of the restructuring dated 15 October 1999 as the restructuring letter dated 15 October 1999 was copied to them but they did not oppose the restructuring until nine months later and must be estopped from denying their liabilities now.

vi. In conclusion the plaintiff is entitled to vary the terms of the loan without consent or notice to the 2nd to the 6th defendants as they have agreed to this entitlement under the corporate guarantee and indemnity and the letter of guarantee.

**[6] Submission By Mr. Jasvinjit Singh For The 2nd To 6th Defendants**

i. On variation of the terms of the loan agreements:

(a) The plaintiff had waived all the conditions set out prior to the drawdown of the loan as set out in the letter of offer dated 18 March 1994 that is to say the plaintiff did not

draw down the loan against the architect's/engineer's certificates for work done. The principal borrower did not meet the condition precedent to draw down in that the principal borrower did not obtain all necessary permits, licences and other approvals including building plans to implement the project. The principal borrower also did not subordinate in priority to the bridging finance facility an amount of RM4 million due to the 2nd guarantor. There was no pre-sale confirmation by auditors/solicitors of RM15 million and an aggregate of 10% of payment having been received from the buyers and credited into the project account.

(b) Yet further the plaintiff had waived the requirement of the borrower to cause all the shareholders of the borrower to execute an agreement of undertaking in form and substance acceptable to the plaintiff as stated in cl. 5.1.1.12 of the bridging loan agreement whereby all the aforesaid shareholders shall undertake during the continuance of this agreement to provide a need to any overruns in the cost of the project and any shortfalls in working capital requirement and secondly the plaintiff further waived the requirement for the borrower to procure the appointment of the lender plaintiff's officer to sit as one of the borrower's representatives in the joint project management committee established under cl. 6.01 of the joint venture agreement with Datuk Bandar of Kuala Lumpur.

(c) The plaintiff waived the requirement for a confirmation by solicitors and or borrower's auditor that the project had achieved an aggregate of RM80 million pre-sales and that an aggregate of 10% of the purchase price had been received from the purchaser and credited into the project account. The project account is the account from which the 2nd defendant guarantor as the main contractor of the project was to be paid.

(d) The bridging loan agreement which was signed subsequently repeats the contents of the letter of offer as submitted in (i) above.

ii. There were further waivers on the affirmative and negative covenants made by the borrower to the plaintiff which are again set out in the bridging loan agreement. The plaintiff took

it upon themselves to monitor the project which was for *inter alia* the protection of the guarantors. However, the plaintiff eventually waived the following requirements of the borrower:

(a) To carry on and conduct its business with due diligence and efficiency and in accordance with sound financial and industrial standards and practices.

(b) Keep full and particular accounts of the carrying out of its business and within 60 days of each financial year forward the plaintiff its audited balance sheet and detailed profit and loss account prepared in accordance with generally accepted accounting principles.

(c) Furnish to the plaintiff quarterly progress report on the project duly certified by its architect/engineer.

(d) Allow the plaintiff to inspect and view its accounts and the project site and conduct valuations on the work done thus far.

iii. As regards to the variation on the amount repayable and the time for doing so I adopt the facts submitted by my learned friend. Throughout the period of variation the principal borrower was a substantial defaulter.

See *Citibank N.A. v. Ooi Boon Leong & Ors* [1980] 1 LNS 168:

> It is necessary to consider the statutory provisions of section 86 of the Contracts Act 1950 which was relied on by the respondents. The section is as follows:
>
> > Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.
>
> The section provides express provision for the respondents to consent to any variation. They are the sole judges whether or not they will consent to remain liable notwithstanding such variation, and that if they have not so consented they will be discharged. This provision is in accordance with what is stated to be the law by Cotton L.J. in *Holme v. Brunskill* [1878] 3 Q.B.D. 495, 505 which was followed in the Privy Council in *National Bank of Nigeria Limited v. Awolesi* [1964] 1 W.L.R. 1311, 1316:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration ... but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

Section 86 cannot be contracted out.

See also *Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors* [1990] 1 CLJ 687; [1990] 1 CLJ (Rep) 141.

iv. The plaintiff had a charge over the project account. However despite repeated requests by the guarantors the plaintiff did not take any step to effect a control over the project account. Eventually a third party garnished the sum in the project account and the entire sum was paid out to the third party. By such conduct the guarantors are discharged by the plaintiff's act or omission impairing the guarantors' eventual remedy. I rely on s. 92 of the Contracts Act 1950.

v. The plaintiff had also granted the principal borrower an extension of time to March 2001 to settle the arrears of interest but then commenced this suit on 19 January 2001 without terminating the revised settlement scheme. Therefore there is no cause of action against the principal borrower a defence in which the plaintiff is entitled to take up.

vi. The plaintiff further failed to take additional security in the form of the assignment of all the rights and benefits under the joint venture development agreement with the Datuk Bandar.

vii. By a letter dated 21 July 2000 the guarantors protested the extension of time given to the borrower and informed the plaintiff that they were no more bound by the guarantee.

viii. As far as the knowledge of restructuring on 15 October 1999 there is no evidence of the date on which the letter of restructure was copied to the guarantors. There was also no reply to the guarantors' protest of 21 July 2000.

ix. As far as the judgment against the principal borrower is concerned, it is irrelevant for three reasons – i) Section 43 of the Evidence Act 1950; ii) the guarantors have separate defences apart from those available to the principal borrower; and iii) the judgment is a judgment in default and is liable to be set aside at any time.

**[7] Reply By Miss Lim**

i. The plaintiff had issued a certificate of indebtedness dated 20 March 2001 under the terms of both guarantees, the certificate conclusive evidence.

ii. Can contract out of s. 86. See *Citibank N.A. v. Ooi Boon Leong & Ors, supra*:

> In any event, the contract of guarantee contains express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing its right against the respondents. Clause 8 provides that the bank may recover from the respondents notwithstanding any failure on its part to take any security or that any security given to the bank is invalid. Clause 16 enables the bank at its absolute discretion and without notice to or consent of the respondents to vary or alter the contract between the bank and the company and that any right of the respondents which is inconsistent with the terms of the contract has been waived by them. In other words there was a voluntary waiver of the rights of the respondents to be subrogated on payment of the loan. Accordingly where the respondents have promised to waive any variation or alteration and the bank has proceeded with the performance of the contract on that basis it would be in our opinion equitable to allow them to resile from the contract.
>
> That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the R.S.C. Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter this

court, shall not deal with the whole matter under the R.S.C. Order 14 procedure. In the present case the guarantee tee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus "A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives." It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs v. National Bank of Australasia Ltd.* [1935] 53 C.L.R. 643; *Bache & Co. v. Banque Vernes* [1973] 2 LL.L.R. 437.

In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

Here contracted out. Privy Council on further appeal confirmed this.

iii. Bank has waived condition precedent to release of the funds. This issue is not within the two issues crystallized for the purpose of this application under O. 14A of the Rules of the High Court, 1980. Secondly, my learned friend refers to the bridging loan agreement between the plaintiff and the 1st defendant. The liability of the 2nd to 6th defendants arose from the two guarantees and not the loan agreement. Further if there were any breaches of the covenant in the loan agreement, the 2nd to 6th defendants have no right to rely on those breaches. Thirdly the clauses in both guarantees are wide enough to allow this alleged variation. I rely on cls. 4.6 and 4.7 of the corporate guarantee and indemnity and cl. 6(iii) of the letter of guarantee giving the plaintiff the right to vary the terms of the agreement including waiver of condition precedent without discharging the guarantors.

iv. Clause 5.2 of the bridging loan agreement provides that the plaintiff has absolute discretion to waive all those condition precedents.

v. The fact that the plaintiff has allegedly failed to appoint itself as one of the signatories to the escrow account under the joint venture agreement between the 1st defendant and the Datuk Bandar Kuala Lumpur is not one of the issues crystallized for the purpose of this application. Secondly the joint venture agreement clearly provides that the disbursement from the escrow account shall be approved by a committee defined in the joint venture agreement that would not include the plaintiff. There is no question of the plaintiff embedding itself as a signatory. Lastly cl. 3.2A of the debenture granted in favour of the plaintiff clearly excludes the escrow account and therefore excludes the plaintiff from being a signatory.

vi. In spite of the fact that the restructuring scheme worked out between the plaintiff and the 1st defendant on the repayment of the bridging loan only expired on March 2001 and this action was commenced before March 2001, the plaintiff had filed this action because there was already a default on the part of the 1st defendant to honour the scheme of repayment thereby entitling the plaintiff to commence legal action even before March 2001. There is no requirement to give formal termination of the scheme.

vii. On s. 43 of the Evidence Act, it is relevant to prove the debt owed by the 1st defendant which is co-extensive with the liability of the guarantors.

**Findings And Decision**

**[8]** The liability of the guarantors in this case is co-extensive with the judgment debt obtained against the 1st defendant in this case as certified by the certificate of indebtedness showing the sum of RM3,988,816.90 as at 31 August 2000 due and owing with interest at the rate of 2.5% above the plaintiff's cost of funds calculated from 1 September 2000 until the date of full settlement.

**[9]** The argument of the counsel for the 2nd to 6th defendants that the condition precedents to the release of the bridging loan to the 1st defendant had been waived and therefore constituted a substantial variation of the terms of the bridging loan agreement which operates to discharge the guarantors from liability, is untenable. First, the condition precedents referred to are at most voidable at the option of the plaintiff and in this case it had elected to waive them. Secondly the plaintiff is entitled in any case under the bridging loan agreement itself under cl. 5.2 to waive any

A condition precedent. The same principle applies with respect to the argument that the plaintiff should have made itself a signatory to the escrow account under the joint venture agreement between the 1st defendant and Datuk Bandar Kuala Lumpur assuming that this can be construed as a condition subsequent in the first place.

B

**[10]** So is the argument that the defendants as guarantors and indemnifiers may not contract out of s. 86 which seeks to discharge a surety from his liability where there is a variation of the terms of the principal obligation. Section 86 is meant to cover C those cases where the parties had not intended that the guarantors or indemnifiers should not be liable where the principal obligation had been substantially varied. The section does not prevent the guarantors and indemnifiers from agreeing to run along with the liability of the borrower where required and necessary D under commercial circumstances. See *Citibank N.A. v Ooi Boon Leong & Ors, supra*, on this point and confirmed by the Judicial Committee of the Privy Council in *Ooi Boon Leong & Ors v. Citibank NA* [1984] 1 MLJ 222 per Lord Brightman:

> (1) if freedom to contract is to be curtailed in relation to a E particular subject matter, the prohibition should be expressed in the statute and not left by the legislature to be picked out as an implication based upon sections dealing with different subject matters. When the Contracts Act intends to render an agreement void it says so in express terms as in sections F 25 to 31;
>
> (2) the clauses in the guarantee are therefore valid and it becomes unnecessary to decide whether the appellants would have been discharged under all or any of the sections of the Contracts Act relied on by the appellants assuming that the G clauses of the guarantee relied upon by the respondent bank are void. It is doubtful however whether it can properly be said that the omission from the debenture of a power to sell out of court was a variance of the agreement by the company to grant a fixed and floating charge within the meaning of section 86 of the Contracts Act relied on by the H appellants, and whether in the terms of the Act the appellants would have been discharged by the omission of the respondent bank to obtain the undertakings called for by the Letters of Agreement;

I **[11]** The plaintiff need not rely on the judgment order it obtained against the 1st defendant as it is relying on the certificate of indebtedness to prove the claim against the defendants. The issue of admissibility of the judgment order is therefore academic

although it is clear that the judgment is relevant to show the co-extensiveness of the liability of the 1st defendant with the guarantors and indemnifiers – the other defendants.

**[12]** The plaintiff's claim against the 2nd to 6th defendants is allowed with costs. The 7th and 8th defendants had not been informed of today's hearing but nevertheless had not turned up since 1 August 2006. Judgment shall likewise be entered against the 7th and 8th defendants as joint and several guarantors together with the 3rd to 6th defendants with costs.